SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 489

L. C. SHELTON, AMERICO DETRES, SR., AS FATHER AND NATURAL GUARDIAN OF AMERICO, JR., A MINOR,
Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, AND COUNTY OF COOK, A BODY POLITIC AND CORPORATE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT.

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OPINION BELOW.

The opinion of the Supreme Court of Illinois is available in 42 Ill. 2d 468, and 148 N. E. 2d 121, as well as in the Petition for Writ of Certiorari, Appendix B.

QUESTION PRESENTED.

Whether the Due Process Clause of the Fourteenth Amendment prevents a state legislature from repealing a special statutory remedy with the effect of terminating pending litigation prior to judgment.

REASONS FOR DENYING THE WRIT.

I.

The Judgment of the Supreme Court of Illinois Was Correct.

At the time of instituting suit for the collection of tort damages in the Circuit Court of Cook County, petitioners had two alternative courses of action: either they could have sued the persons responsible for any alleged damage on the basis of their common law liability, or they could have sued the governmental units in which the alleged damage took place under a special statutory remedy making municipal corporations liable for "mob violence" damage. Petitioners chose the latter course, suing under the special statutory remedy. While the suit was pending, the Illinois General Assembly repealed, without a saving clause, the special statutory remedy.

The Supreme Court of Illinois, in an opinion by Mr. Justice Walter V. Schaefer, refused to accept petitioners' contention that:

> ". . . because their injuries had occurred and their pending actions had been commenced while the repealed statutes were in effect, their rights were vested, and could not, as a matter of constitutional law, be retroactively defeated by the repeals. The remedy sought to be asserted is clearly, in the language of our earlier decisions, a special statutory remedy. There is in these cases no element of contract, nor is there any suggestion of conduct by the plaintiffs undertaken in reliance upon the repealed statutes. . . . The legislature, which for a time had permitted a remedy against subordinate governmental units for damage resulting from mob violence, has withdrawn remedy." (42 Ill. 2d 468, 474; 148 N. E. 2d 121, 124; Pet. Appendix B, p. 8a.)

Mr. Justice Schaefer, in the passage quoted, states the law succinctly and accurately. In *Flanigan* v. *Sierra County,* 196 U. S. 553 (1905) at 560, this court recognized the same principle:

> "The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, § 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon's Abridgement, 226."

Petitioners cite in support of their position the case of *Gibbes* v. *Zimmerman,* 290 U. S. 326 (1933). That case more clearly supports respondent's position than petitioners' inasmuch as it clearly states that there is no property right in any particular form of remedy; only the substantial right to redress is protected by the Fourteenth Amendment. This is precisely what Mr. Justice Schaefer was responding to when he wrote (42 Ill. 2d 468, 475; 148 N. E. 2d 121, 124; Pet. App. B, p. 9a):

> "One who has suffered riot damage has a remedy against the persons who inflicted the injury. That remedy may be of little practical value in many cases, but the same is true of the victim of a rape, a robbery, or a hit-and-run driver. It is hard to say that one group of innocent victims of criminal conduct is more deserving of compensation from the community than the other."

Again, petitioners cite *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338 (1922). But at issue there was "a right to recover money that is *due when the act is passed*" (Emphasis supplied; See Petition, p. 8 for complete quote). Surely the fact that money was already *due* is relevant to the question of whether a right has "vested;" and since there had been no judgment in the instant case, *i.e.,* nothing was due, this case also provides authority for respondent's position, rather than petitioners'.

Petitioners are not warranted in asserting, as they do at page 9 of their Petition, that the intermediate appellate court of Ohio in *Pickering* v. *Pickering*, 43 Ohio App. 401, 183 N. E. 301 (1930), relied even "in part" on the Due Process clause. What is certain in that decision is that the Ohio constitution prohibited *any* retroactive laws, and that, as a matter of Ohio law, a right of action for tort was a property right (183 N. E. at 303). Similarly, there is no hint, in *Minty* v. *State*, 336 Mich. 370, 58 N. W. 2d 106 (1953) that there was any issue of due process; as a matter of Michigan law, the court there reached the same result at that reached in *Pickering*. Both cases, therefore, turn on local law, not on the requirements of due process.

We conclude, as a result, that the judgment of the Supreme Court of Illinois is correct.

II.

The Petition for Writ of Certiorari Presents No Substantial Federal Issue.

Petitioners do not argue that the repeal of the special statutory remedy involved in this suit is invalid on its face; rather, the claim of invalidity affects only the relatively small number of litigants whose suits were pending at the time of repeal. Thus, the issue of whether this group of Petitioners alone should be permitted to enjoy a special statutory remedy when they already have a common law remedy can hardly be said to present a "substantial" issue.

Moreover, the issue is one that has clearly been foreclosed by prior decisions of this Court. In *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285 (1883), Mr. Justice Field, writing for the Court, observed at 287 that:

"The right to reimbursement for damages caused by

> a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure."

The opinion goes on, in its concluding sentence, to distinguish between a special statutory remedy, which was before the Court, and the common law remedy, which was not. Mr. Justice Bradley, concurring, was even more explicit in his statement of the law, at 291:

> ". . . [R]emedies against municipal bodies for damages caused by mobs or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending upon positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall, or shall not, indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall, or shall not, do so, is a matter of legislative discretion. . . . Until the claim is reduced to possession, it is subject to legislative regulation."

He, too, distinguished between "this kind of judgment, now under consideration, and other judgments for claims based upon the absolute right of the party" (at 291).

This rule has been consistently followed by this Court and by other federal courts, see, *i.e., U. S.* v. *Weekly Publications, Inc.,* 144 F. 2d 186 (2d Cir., 1944) in which Judge Augustus Hand wrote, at 188:

> "The relator acquired no vested right prior to the date of the amendment. His privilege of conducting the suit on behalf of the United States and sharing in the proceeds of any judgment recovered, was an award of statutory creation which, prior to final judgment, was wholly within the control of Congress."

See also *Flanigan* v. *County of Sierra*, 196 U. S. 553 (1904); *U. S.* v. *Hammond*, 99 F. 2d 557 (5th Cir., 1938); *Murray* v. *Homestead Value Mfg. Co.*, 84 F. Supp. 572 (1947); *Salt Co.* v. *East Saginaw*, 13 Wall. 373, 80 U. S. 373 (1871).

We can only conclude, from this abundant authority, that the issue raised by Petitioners is no longer open to question and that, therefore, there is no substantial federal question.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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